



Complying With the Recovery Act Buy American Provisions:

Requirements, Certification, and Liability Implications



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Complying With the Recovery Act Buy American Provisions: Requirements, Certification, and Liability Implications

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Recovery Act Overview

- American Recovery and Reinvestment Act Funding
 - Transit/highways: \$27+ billion
 - Health information technology: \$20+ billion
 - Cleantech (inc. tax incentives): \$80 billion
 - Military construction: \$4+ billion
 - Broadband expansion: \$7+ billion
 - DHS activities: \$2.7+ billion
 - Environmental (SRFs): \$10+ billion
 - NIH programs: \$10+ billion



Recovery Act Buy American – Introduction

- Section 1605 – Buy American (BA) requirement
 - All iron, steel and manufactured goods
 - Used on Recovery Act-funded Public Buildings/Works
 - Must be made in America
 - Unless an exception/waiver
- Covers two types of materials used in construction
 - Iron and steel goods used on the project
 - Manufactured goods used as construction materials



Recovery Act Buy American – Introduction

- Construction materials are goods brought to the job site
- Applies to
 - Federal financial assistance (*i.e.*, loans and grants)
 - Direct federal procurement
- To be implemented consistent with US international obligations
- Different from 1933 BAA and FTA/FHWA/FAA Buy America



Recovery Act Buy American – Loans and Grants

- Loans and Grants: Interim Final Guidance – 2 CFR Part 176
 - Issued by OMB to Federal agencies April 3, 2009
 - Effective immediately
 - Comments filed June 22, 2009; no further guidance since and none expected
 - Covers
 - Construction projects funded with
 - Federal Grants, Cooperative Agreements, Loans
 - That are Recovery Act-funded



Recovery Act Buy American – Loans and Grants

- Agencies to publish own grant regs using OMB guidance
- First time BA applied to federal financial assistance outside of FTA/FHWA/FAA
 - Main impact is at the state and local government level
- Four BA loan/grant terms to be used
 - Basic terms: 2 CFR 176.140
 - RFP Notice: 2 CFR 176.150
 - Int'l agreements terms: 2 CFR 176.160
 - Used for projects over \$7.443 million, when int'l agreement applies
 - RFP Notice: 2 CFR 176.170



Recovery Act Buy American – Direct Federal Procurement

- New FAR Section 25.6 – Recovery Act/BA/Construction Materials
 - Applies to construction materials on Recovery Act construction projects
 - Covers Public Building/Works contracts above \$2,000
- Construction materials from WTO GPA/FTA countries treated as domestic on projects over applicable threshold



Recovery Act Buy American – Direct Federal Procurement

- Unique BA clauses for Recovery Act projects
 - 52.225-21 (Basic clause) (for projects under the GPA/FTA thresholds)
 - 52.225-22 (Notice for RFPs)
 - 52.225-23 (Trade agreements clause) (over the GPA/FTA thresholds, generally \$7.443 million)
 - 52.225-24 (Notice for RFPs)



Recovery Act Buy American – Construction Materials

- Iron and Steel Goods
 - All manufacturing must be in US
 - Melting
 - Pouring
 - Rolling
 - But not including metallurgical processes
- Iron and steel goods must be 100% US iron/steel content
- Requires supply chain compliance documentation
 - From steel mill to
 - Construction site



Recovery Act Buy American – Construction Materials

- Does not cover iron/steel in components of manufactured goods
- What is a steel good?
 - No definition provided
 - Steel ductwork?
 - Ranges, microwave ovens?
 - Steel pipe?



Recovery Act Buy American – Construction Materials

- Manufactured Goods
 - Essentially all construction materials except iron and steel goods
 - Differing definitions
 - FAR 25.6 definition
 - "Construction material" – article, material, supply
 - Brought to construction site
 - For incorporation in building/work
 - Special rule for emergency life safety systems
 - "Any construction material that is not unmanufactured construction material"



Recovery Act Buy American – Construction Materials

- OMB Grant Guidance definition
 - Goods brought to construction site
 - For incorporation into Public Building/Work
 - Processed into specific form/shape; or
 - Combined with other raw material to create material with different properties than those of the individual raw materials



Recovery Act Buy American – Construction Materials

- Manufactured goods (cont'd)
 - No domestic component/subcomponent requirement
 - Only question – place where final product manufactured
 - No supply chain compliance required
 - Different from
 - 1933 ACT (More than 50% US components)
 - FTA/FHWA/FAA Buy America (100% US components/60% (rolling stock))
 - No definition of “manufacturing in US”
 - Seems to be processing/combining
 - Substantial transformation likely meets it



Recovery Act Buy American – International Agreements

- For grants/loans, international agreements triggered when
 - Iron/steel/manufactured goods are from a country that is a "Party" to int'l agreement, and
 - Grant recipient (US state/locality) is a Party to the int'l agreement and obligated to treat the first Party's goods same as domestic, and
 - Construction project is over \$7.443 million
- Permits use of covered foreign goods without BA waiver or evaluation price evaluation penalty



Recovery Act Buy American – International Agreements

- For direct federal procurements, international agreements triggered when
 - Iron/steel/manufactured goods are from a country that is a "Party" to int'l agreement, and
 - Construction project is over applicable GPA/FTA threshold, generally \$7.443 million
- Permits use of covered foreign goods without BA waiver or evaluation price evaluation penalty
- DoD follows different rules



Recovery Act Buy American – International Agreements

- Most major US allies are signatories
 - Special rules for Canada as of February 16, 2010
- US states/localities not covered unless signatory parties
 - 37 US states and public authorities are “parties”
 - Parties listed in appendix to Subpart B of OMB Guidance
- No flowdown below parties listed in appendix
 - Thus US localities not covered by int’l agreements even if their state is a signatory
 - Special rule for Canadian firms as of February 16, 2010
- Brazil, China and India goods adversely impacted most



Recovery Act Buy American – Exceptions

- Exceptions same in FAR 25.6 and OMB Guidance
 - Non-available goods
 - Unreasonable cost
 - Public interest
- Non-available goods
 - Use FAR 25.104(a) List – Non-availability presumed
 - Individual non-availability determinations
 - Head of agency/Agency Award Officer (AO) approval
 - D&F required
 - Notice in Federal Register



Recovery Act Buy American – Exceptions

- Unreasonable cost
 - Domestic material will increase “overall project” cost by +25%
 - First requires showing of +25% project cost increase
 - CO or federal agency approves exception
 - Exception published in Federal Register
 - Price evaluation factor of 25% still applied to entire offer using foreign construction material
 - So exception simply permits use of foreign materials
 - Alternate offers invited



Recovery Act Buy American – Exceptions

- Public interest
 - Head of agency level approval
 - D&F required
 - Federal Register notice required



Recovery Act Buy American – Exceptions

- Late (*i.e.*, post-award/obligation) requests
 - If CO/AO concludes request should have been submitted earlier – may deny request
 - Submission and approval requirements similar to timely request
 - Award must be amended to reflect exception
- Contract/award adjustment
 - Contracts – "Adequate consideration" required
 - Awards – Adjustment grant amount
 - Non-availability/Public Interest
 - Cost of foreign steel/goods
 - Unreasonable cost
 - "At least" the 25% differential



Recovery Act Buy American – EPA, HUD and FTA/FWHA

- EPA
 - Nationwide BA Waiver
 - Covers SRF Clean Water/Drinking water projects
 - Debt incurred 10/1/08 – 2/16/09
 - Based on legislative history and impact of delay
 - New Canadian rules do not apply to pre-2/16/10 funds
- HUD
 - National exception for projects substantially under contract
 - Prime contract award
 - Pending HUD approval
 - Substantial delay, etc.



Recovery Act Buy American – EPA, HUD and FTA/FWHA

- FTA/FHWA/FAA
 - Will follow existing Buy America rules
 - May conflict with OMB Guidance and Recovery Act



Recovery Act Buy American – Compliance

- Will certifications be required?
- Prime contractor certifications not required, but likely
 - Construction clauses do not require certification of compliance
 - Unlike the Supplies clause (FAR 52.225-2)
 - Unlike Trade Agreements Act clause (FAR 52.225-6)
 - Only statement of non-US construction materials if seeking exception
 - But, state and local entities likely to require certifications
 - Self-protection
 - Federal COs likely to require express representations of compliance
 - FAR 1.107 precludes new certification requirements unless
 - Required by statute, or
 - Approved by OFPP



Recovery Act Buy American – Compliance

- **Primes should resist certification demands**
 - Increase exposure, helps turn contract breach into false statement
 - Not required by law, OMB Guidance or FAR
 - Contrary to FAR 1.107
- **Same with indemnification/hold harmless clauses**
- **Use of the BA clauses alone should suffice**
 - Supplementary statement in offer/bid at most
- **Supplying non-BA compliant construction materials**
 - Is a breach of the BA clauses
 - Irrespective of using certifications or not



Recovery Act Buy American – Compliance

- **Subs/supplier certifications also likely**
 - Primes may require certifications from
 - First tier subs/suppliers of construction materials
 - Self-protection by primes
 - Should be resisted by subs/suppliers – not required by regulation
 - Be alert to subcontracts that incorporate prime contract – BA will be read in
 - Lower tiers can also argue component exception for manufactured goods
 - Resist indemnification/hold harmless clauses



Recovery Act Buy American – Compliance

- Corrective Action Plans
 - CO/AO may request contractor/recipient propose corrective action plan
 - CO/AO to process determination
 - Removal/replacement to be considered
 - If not practical, written determination required
 - Not deemed an exception
- Agency may impose further sanctions
 - Withholding cash payments from awardees



Recovery Act Buy American – Compliance

- Agency may impose further sanctions (cont'd)
 - Reducing/suspending/terminating (default) contract/award
 - Withholding future awards
 - Suspension/debarment
 - If fraud, refer appropriately
- Protests based on BA violations are possible
 - Usually must give notice to agency
 - Before bid due date
 - With specifics why competitor is non-compliant
 - Notice creates duty on agency to investigate



Recovery Act – Whistleblower Protections

- Recovery Act Section 1553
 - Prohibition of reprisals against
 - an employee of any non-federal employer receiving Recovery Act funds
 - Includes state and local government employees
 - for disclosing information
 - reasonably believed to be evidence of
 - fraud, waste and abuse related to Recovery Act funds



Recovery Act – Whistleblower Protections

- Modeled after 10 U.S.C. § 2409 (employees of DoD contractors), but more expansive
 - Requirements imposed on employers
 - Remedies afforded aggrieved whistleblowers
- Prediction
 - Will be used frequently by discharged employees
 - Will lead to companion FCA suits



Recovery Act– False Claims Act

- FCA exposure
 - Contractor/grantee/subcontractor liability
 - For invoices submitted on projects using federal funds
 - Includes Recovery Act funding
 - \$11,000 per false invoice
 - Treble damages



Recovery Act– False Claims Act

- Qui tam suits
 - FCA suits brought by private person on behalf of government
 - Plaintiff (relator) gets a percentage of recovery
 - US may join suit, or may not
 - Whistleblower and ex-employee suits common source of FCA qui tam claims
 - Plaintiffs' bar well aware of FCA



Recovery Act Buy American – False Claims Act Exposure

- 1933 BAA violations have led to FCA claims
 - Main basis is BAA certification required for supplies
 - But certification not necessary for FCA liability
- Recovery Act construction materials clauses do not require certification of compliance, only disclosure of non-US goods
- Recovery Act BA compliance and reporting are express grant conditions
- Federal grant recipients have been FCA targets
- Note linkage with Recovery Act whistleblower protections



Recovery Act Buy American – False Claims Act Expansion

- Prior to May 2009, FCA exposure primarily for primes
 - Exposure limited for subs/suppliers
 - Had to show subs/suppliers specifically intended to mislead US government
- Fraud Enforcement and Recovery Act amended FCA
 - Eliminated “presentment to US” requirement
 - Now false claims presented to prime contractors and grantees by subs/suppliers covered by FCA
 - Increases incentive for primes to seek certifications/indemnifications
 - Primes will look push liability to subs/suppliers



Recovery Act Buy American – False Claims Act Expansion

- Eliminated specific intent
 - No need to show actual knowledge of falsity
 - No need to show should have known of falsity
 - Just being wrong could be enough
 - Good faith mistake or third-party fault are likely only defenses left
- Reverse false claims
 - When liability to US is reduced by contractor
 - No affirmative act required
 - Knowing avoidance of paying government sufficient



Recovery Act Buy American – False Claims Act

- Knowing non-compliance with BA = FCA violation
- Certifications not required for FCA violation, but help US prove violation
- Primes/subs/suppliers must have country of origin compliance system
- Indemnifications can make subs/suppliers liable far in excess of goods sold to prime



Recovery Act Buy American – Impact on Supply Chain

- Impact is far beyond Recovery Act projects
- Primes need to be BA compliant
- Primes demand that subs and suppliers prove BA compliance
- Subs/suppliers don't want cost of two supply chains – BA compliant and non-BA compliant – unless major price difference
- Subs/suppliers demand lower tiers prove BA compliance, and favor BA compliant goods



Recovery Act Buy American – Teaching Points

- Use country of origin compliance system
- Otherwise, don't perform Recovery Act projects
- Resist certifications
- Monitor BA compliance
- Primes should engage with agency on BA
- Subs/suppliers should engage with primes on BA
- Consult counsel early – can reduce exposure considerably



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Thank You for Participating! Questions?

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